

will depend upon whether the subsequent request for the same project is complete, i.e., the department does not have to request additional documentation and information in order to make a determination. If a subsequent request for funding of the same project is:

(a) Complete, then the date of the first request may be used when applying subsection (8), or

(b) Incomplete, then the date of the subsequent request must be used when applying subsection (8) even though the physical plant improvements may be completed and fully utilized prior to that date.

(11) The department shall respond, in writing, not later than sixty days after receipt of a complete request.

(12) If the contractor does not use the funds for the purpose for which they were granted, the department shall immediately recoup the misspent or unused funds.

(13) When any physical plant improvements made under subsection (1) or (2) results in a change in licensed beds, any rate add-on granted will be subject to the provisions regarding the number of licensed beds, patient days, occupancy, etc., included in this chapter.

(14) All rate components to fund the Medicaid share of nursing facility new construction or refurbishing projects costing in excess of one million two hundred thousand dollars, or projects requiring state or federal certificate of need approval, shall be based upon a minimum facility occupancy of eight-five percent for the nursing services, food, administrative, operational and property cost centers, and the return on investment (ROI) rate component, during the initial rate period in which the adjustment is granted. These same component rates shall be based upon a minimum facility occupancy of ninety percent for all rate periods after the initial rate period.

AMENDATORY SECTION (Amending Order 2025, filed 9/16/83)

WAC 388-96-813 Suspension of payment. (1) Payments to a contractor may be withheld by the department in each of the following circumstances:

(a) A required report is not properly completed and filed by the contractor within the appropriate time period, including any approved extensions. Payments will be released as soon as a properly completed report is received.

(b) Auditors or other authorized department personnel in the course of their duties are refused access to a nursing ~~((home))~~ facility or are not provided with existing appropriate records. Payments will be released as soon as such access or records are provided.

(c) A refund in connection with a preliminary or final settlement or rate adjustment is not paid by the contractor when due. The amount withheld will be limited to the unpaid amount of the refund and any accumulated interest owed to the department as authorized by this chapter and chapter 74.46 RCW.

(d) Payment for the final ~~((thirty))~~ sixty days of service under a contract will be held in the absence of adequate alternate security acceptable to the department pending final settlement when the contract is terminated.

(e) Payment for services at any time during the contract period in the absence of adequate alternate security acceptable to the department, if a contractor's net Medicaid

overpayment liability for one or more nursing facilities or other debt to the department, as determined by preliminary settlement, final settlement, civil fines imposed by the department, third-party liabilities or other sources, reaches or exceeds fifty thousand dollars, whether subject to good faith dispute or not, and for each subsequent increase in liability reaching or exceeding twenty-five thousand dollars. Payments will be released as soon as practicable after acceptable security is provided or refund to the department is made.

(2) No payment will be withheld until written notification of the suspension is given to the contractor, stating the reason ~~((therefor))~~ for the withholding, except that neither a request to pursue administrative review under WAC 388-96-904 nor commencement of judicial review, as may be available to the contractor in law, shall delay suspension of payment.

AMENDATORY SECTION (Amending Order 3185, filed 5/31/91, effective 7/1/91)

WAC 388-96-901 Disputes. (1) If a reimbursement rate issued to a contractor is believed to be incorrect because it is based on errors or omissions by the contractor or department, the contractor may request an adjustment pursuant to WAC 388-96-769. Pursuant to WAC 388-96-904(1) a contractor may within twenty-eight days request an administrative review after notification of an adjustment or refusal to adjust.

(2) For all nursing facility prospective Medicaid payment rates effective on or after July 1, 1995, and for all settlements and audits issued on or after July 1, 1995, regardless of what periods the settlements or audits may cover, if a contractor wishes to contest the way in which a department rule~~((contract provision, or policy statement utilized as part of the prospective cost-related reimbursement))~~ relating to the Medicaid payment rate system~~((rate calculation methodology))~~ was applied to the contractor by the department, e.g., in setting a ~~((reimbursement))~~ payment rate or determining a disallowance at audit, it shall ~~((first))~~ pursue the administrative review process set out in WAC 388-96-904.

(3) ~~((Subject to subsection (5) of this section the administrative review and fair hearing process set out in WAC 388-96-904 need not be exhausted))~~ If a contractor wishes to challenge the legal validity of a statute, rule~~((or))~~ or contract provision or ~~((policy statement))~~ wishes to bring a challenge based in whole or in part on federal law, including but not limited to issues of procedural or substantive compliance with the federal Medicaid minimum payment standard known as the Boren Amendment, found at 42 USC 1396a (a)(13)(A) and in federal regulation, as it applies to long-term care facility services, the administrative review procedure authorized in WAC 388-96-904 may not be used for these purposes. This prohibition shall apply regardless of whether the contractor wishes to obtain a decision or ruling on an issue of validity or federal compliance or wishes only to make a record for the purpose of subsequent judicial review.

(4) ~~((The department's administrative review and fair hearing process, set out in WAC 388-96-904 and in RCW 74.46.780, shall not be used to challenge the adequacy of prospective or settlement reimbursement rates or rate~~



complaints, whether preliminary or final, either individually or collectively, or to challenge audit actions or adjustments under the federal Boren amendment payment standard found at 42 USC 1396a (a)(13)(A) and contained in federal regulation. Further, the administrative review and fair hearing process shall not be used to challenge the department's procedural compliance with this standard. Only in courts of proper jurisdiction shall contractors challenge the department's substantive and/or procedural compliance with the Boren amendment standard.

(5) The prohibition contained in subsection (4) against pursuit of substantive or procedural Boren amendment challenges in the administrative review and fair hearing process shall apply regardless of whether the challenge is brought for the purpose of obtaining an administrative decision or for the purpose of making a record or argument for subsequent judicial review. Further, the process shall not be used to challenge the validity of statutes or regulations, whether for the purpose of obtaining an administrative decision or making a record or argument for subsequent judicial review, based upon alleged substantive or procedural noncompliance with the Boren amendment standard. If a contractor wishes to challenge the legal validity of a statute, rule or contract provision relating to the Medicaid payment rate system, or wishes to bring a challenge based in whole or in part on federal law, it must bring such action de novo in a court of proper jurisdiction as may be provided by law.

AMENDATORY SECTION (Amending Order 3737, filed 5/26/94, effective 6/26/94)

WAC 388-96-904 Administrative review—Adjudicative proceeding. (1) ((Within twenty-eight days after a contractor is notified of an action or determination it wishes to challenge, the contractor shall request, in writing, the appropriate director or the director's designee review such determination. The contractor shall send the request to the office of rates management, aging and adult services administration. If the contractor uses a facsimile to establish the request for review, the facsimile must conform to subsection (1)(a), (b) and (c) and the original including the requirements of subsection (d) of this section must be received by the office of rates management within seven days after the transmission of the facsimile. The contractor or the licensed administrator of the facility shall:

- (a) Sign the request;
- (b) Identify the challenged determination and the date thereof;
- (c) State as specifically as practicable the issues and regulations involved and the grounds for contending the determination is erroneous; and
- (d) Attach to the request copies of any documentation the contractor intends to rely on to support the contractor's position.

(2) After receiving a timely request meeting the criteria of subsection (1) of this section, the department shall contact the contractor to schedule a conference for the earliest mutually convenient time. If the department and contractor cannot agree to a mutually convenient time, then department shall schedule the conference for no earlier than fourteen days after the contractor was contacted by the department to schedule the conference and no later than ninety days after

a properly completed request is received, unless both parties agree, in writing, to a specific later date. The department may conduct the conference by telephone unless either the department or the contractor requests, in writing, the conference be held in person.

(3) The contractor and appropriate representatives of the department shall participate in the conference. In addition, representatives selected by the contractor may participate. The contractor shall bring to the conference and provide to the department fourteen days in advance of the conference:

(a) Any documentation requested by the department which the contractor is required to maintain for audit purposes under WAC 388-96-112; and

(b) Any documentation the contractor intends to rely on to support the contractor's contentions. The parties shall clarify and attempt to resolve the issues at the conference. If additional documentation is needed to resolve the issues, the parties shall schedule a second session of the conference for not later than thirty days after the initial session unless both parties agree, in writing, to a specific later date.

(4) Regardless of whether agreement has been reached at the conference, the director of management services division, aging and adult services or designee shall furnish the contractor a written decision within sixty days after the conclusion of the last conference held or the receipt of all required documentation on the action or determination challenged by the contractor.

(5) A contractor has the right to an adjudicative proceeding to contest only issues raised in the administrative review conference and addressed in the director's administrative review decision.

(a) A contractor contesting the director's decision shall within twenty-eight days of receipt of the decision:

- (i) File a written application for an adjudicative proceeding with the office of appeals;
- (ii) Sign the application or have the licensed administrator of the facility sign it;
- (iii) State as specifically as practicable the issues and law involved;
- (iv) State the grounds for contesting the director's decision; and
- (v) Attach to the application a copy of the director's decision being contested and copies of any documentation the contractor intends to rely on to support its position.

(b) The proceeding shall be governed by the Administrative Procedure Act (chapter 34.05 RCW), this chapter, and chapter 388-08 WAC. If any provision in this chapter conflicts with chapter 388-08 WAC, the provision in this chapter governs.

(6) Subject to subsection (7) of this section adjudicative proceedings timely requested under subsection (5) of this section shall be dismissed unless within one calendar year after the department receives the application:

(a) All issues have been resolved by a written, signed settlement agreement between the contractor and the department; or

(b) The evidentiary record, including all briefing, has been closed.

(7) If a written settlement agreement resolving all the issues has not been signed by both the contractor and the department and if the evidentiary record, including all briefing, has not been closed upon the expiration of one year

after the application was received by the department, the office of administrative hearing shall, within fourteen days after the expiration date:

(a) Issue a written order dismissing the adjudicative proceeding with prejudice to the contractor; or

(b) Issue a written order for a continuance for good cause described in the order for a period not to exceed ninety days.

Good cause as stated in the order must show the hearing was prevented from being held because of circumstances that were beyond the control of the contractor. Upon expiration of any extension period and without either a signed settlement agreement resolving all issues or a closed evidentiary record including all briefings, the office of administrative hearings shall either dismiss with prejudice to the contractor or continue for good cause as provided in this subsection. Orders for dismissal or continuance shall be subject to a petition for review timely filed with the department's office of appeals if desired by either party. The provisions of this section shall apply to administrative review of all nursing facility payment rates effective on and after July 1, 1995, and to administrative review of all audits and settlements issued on or after this date, regardless of what payment period the audit or settlement may cover. Contractors seeking to appeal or take exception to an action or determination of the department relating to the contractor's payment rate, audit or settlement, or otherwise affecting the level of payment to the contractor, shall request an administrative review conference in writing within twenty-eight calendar days after receiving notice of the department's action or determination. The contractor shall be deemed to have received notice five calendar days after the date of the notification letter, unless the contractor can provide proof of later receipt. The contractor's request for administrative review shall be signed by the contractor or by a partner, officer or authorized employee of the contractor, shall state the particular issues raised and include all necessary supporting documentation or other information.

(2) After receiving a request for administrative review meeting the criteria in subsection (1) of this section, the department shall schedule an administrative review conference to be held within ninety calendar days after receiving the contractor's request. By agreement this time may be extended up to sixty additional days, but a conference shall not be scheduled or held beyond one hundred fifty calendar days after the department receives the contractor's request for administrative review. The conference may be conducted by telephone.

(3) At least fourteen calendar days prior to the scheduled date of the administrative review conference, the contractor must supply the additional documentation or information upon which the contractor intends to rely in presenting its case. In addition, the department may request at any time prior to issuing a decision any documentation or information needed to decide the issues raised and the contractor must comply with such a request within fourteen calendar days after it is received. This period may be extended up to fourteen additional calendar days for good cause shown if the contractor requests an extension in writing received by the department before expiration of the initial fourteen day period. Issues which cannot be decided or resolved due to a contractor's failure to provide requested

documentation or information within the required period shall be dismissed.

(4) The department shall, within sixty calendar days after the conclusion of the conference, render a decision in writing addressing the issues raised, unless the department is waiting for additional documentation or information requested from the contractor pursuant to subsection (3) of this section, in which case the sixty-day period shall not commence until the department's receipt of such documentation or information or until expiration of the time allowed to provide it. The decision letter shall include a notice of dismissal of all issues which cannot be decided due to missing documentation or information requested.

(5) A contractor seeking further review of a decision issued pursuant to subsection (4) of this section:

(a) Shall request, in writing, signed by one of the individuals authorized by subsection (1) of this section, within twenty-eight calendar days after receiving the department's decision letter, an adjudicative proceeding to be conducted by a presiding officer employed by the department's office of appeals; or

(b) Shall file, in the event the parties are able to stipulate to a record that can serve as the record for judicial review, a petition for judicial review pursuant to RCW 34.05.570(4).

The contractor shall be deemed to have received notice of the department's conference decision five calendar days after the date of the decision letter, unless the contractor can provide proof of later receipt.

(6) The scope of an adjudicative proceeding shall be limited to the issues specifically raised by the contractor at the administrative review conference and addressed in the department's decision letter. The contractor shall be deemed to have waived all issues which could have been raised by the contractor relating to the challenged determination or action, but which were not pursued at the conference and addressed in the department's decision letter.

(7) If the contractor wishes to have further review of any issue dismissed by the department for failure to supply needed or requested information or documentation, the issue shall be considered by the presiding officer for the purpose of upholding the department's dismissal, reinstating the issue and remanding for further agency staff action or reinstating the issue and rendering a decision on the merits.

(8) An adjudicative proceeding shall be conducted in accordance with this chapter, chapter 388-08 WAC and chapter 34.05 RCW. In the event of a conflict between the provisions of this chapter and chapter 388-08 WAC, the provisions of this chapter shall prevail. The presiding officer assigned by the department's office of appeals to conduct an adjudicative proceeding and who conducts the proceeding shall render the final agency decision.

(9) The office of appeals shall issue an order dismissing an adjudicative proceeding requested under subsection (5)(a), unless within two hundred seventy days after the office of appeals receives the application or request for an adjudicative proceeding:

(a) All issues have been resolved by a written settlement agreement between the contractor and the department signed by both and filed with the office of appeals; or

(b) An adjudicative proceeding has been held for all issues not resolved and the evidentiary record, including all

rebuttal evidence and post-hearing or other briefing, is closed.

This time limit may be extended thirty additional days for good cause shown upon the motion of either party made prior to the expiration of the initial two hundred seventy day period. It shall be the responsibility of the contractor to request that hearings be scheduled and ensure that settlement agreements are signed and filed with the office of appeals in order to comply with the time limit set forth in this subsection.

(10) Any party dissatisfied with a decision or an order of dismissal of the office of appeals may file a petition for reconsideration within ten days after the decision or order of dismissal is served on such party. The petition shall state the specific grounds upon which relief is sought. The time for seeking reconsideration may be extended by the presiding officer for good cause upon motion of either party. The presiding officer shall rule on a petition for reconsideration and may seek additional argument, briefing, testimony or other evidence if deemed necessary. Filing a petition for reconsideration shall not be a requisite for seeking judicial review; however, if a petition is filed by either party, the agency decision shall not be deemed final until a ruling is made by the presiding officer.

(11) A contractor dissatisfied with a decision or an order of dismissal of the office of appeals may file a petition for judicial review pursuant to RCW 34.05.570(3).

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-96-216	Deadline for completion of audits.
WAC 388-96-753	Return on investment—Effect of funding granted under WAC 388-96-774, 388-96-776, and 388-96-777.
WAC 388-96-902	Recoupment of undisputed overpayments.

**WSR 95-16-002
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE
(Fisheries)**

[Order 95-89—Filed July 19, 1995, 4 10 p.m.]

Date of Adoption: July 19, 1995

Purpose: Commercial fishing regulations.

Citation of Existing Rules Affected by this Order:
Amending WAC 220-24-020.

Statutory Authority for Adoption: RCW 75.08.080.

Pursuant to RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: A harvestable surplus of salmon is available for the troll fleet. These rules are adopted at the recommendation of the Pacific Fisheries Management Council, in accordance with preseason fishing plans.

Effective Date of Rule: Immediately.

July 19, 1995

Ed Manary

for Robert Turner

Director

NEW SECTION

WAC 220-24-0200W Commercial salmon troll. Notwithstanding the provisions of WAC 220-24-010, 220-24-020 and WAC 220-24-030, effective immediately until further notice it is unlawful to fish for or possess salmon taken for commercial purposes with troll gear from those waters west of the Bonilla-Tatoosh, the Pacific Ocean and waters west of the Buoy 10 Line at the mouth of the Columbia River, except as provided for in this section:

(1)(a) In waters north of Carroll Island (48°00'18" N) it is lawful to fish for and possess all salmon species other than chinook salmon on the following days:

August 5 through August 8
August 12 through August 15
August 19 through August 22
August 26 through August 29
September 2 through September 5, and
September 9 through September 12, 1995.

(b) All salmon taken during the four day open periods provided for in this subsection must be sold within 24 hours of the closing date of each fishery and must be sold within the open Salmon Management and Catch Reporting Area or in an immediately adjacent closed Salmon Management and Catch Reporting Area.

(c) Lawful terminal gear during the fishing period provided for in this subsection is restricted to flashers with barbless, bare, blued hooks or flashers with barbless hooks and pink hoochies 3 inches or less.

(d) No vessel may land or possess more than 80 coho salmon in each of the four day open periods provided for in this subsection.

(2) In the fisheries authorized in this section:

(a) No coho salmon smaller than 16 inches in total length may be taken or retained. Except that frozen salmon taken in this fishery may be landed pursuant to WAC 220-20-015.

(b) It is unlawful to fish for or possess salmon taken for commercial purposes with gear other than troll gear.

(c) It is unlawful to land salmon taken south of Cape Falcon in any port north of Cape Falcon, except when the waters north of Cape Falcon are closed. It is unlawful to take or retain chinook south of Cape Falcon that are less than 26 inches in length.

EMERGENCY